

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH**

In the Matter of the Involuntary
Discharge of E.H. (Petitioner) by
Augustana Health Care Center of
Hastings (Respondent)

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The Minnesota Department of Health (the Department) initiated this contested case proceeding by issuing a Notice of and Order for Hearing on August 30, 2006. The notice scheduled a hearing in this matter for Wednesday, September 13, 2006, at Augustana Health Care of Hastings, 930 West 16th Street, Hastings, MN 55033-3399.

Lori Goetz, Regional Ombudsman, Office of Ombudsman for Older Minnesotans, Post Office Box 64971, Saint Paul, MN 55164-0971 appeared as the representative of Petitioner E. H. in this proceeding. Steve Vesall, Augustana Care Corporation, 1007 East 14th Street, Minneapolis, MN 55404 appeared as a representative of Respondent, Augustana Health Care Center of Hastings (Augustana). The OAH record closed on September 28, 2006, following post-hearing submissions from the parties.

NOTICE

This Report is only a recommendation to the Commissioner and is not a final decision. The Commissioner will make her final decision after reviewing this report and the hearing record. In making that decision the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations that appear in this Report.¹

Under Minnesota Law,² the Commissioner may not make her final decision until after the parties have had access to this Report for at least ten (10) days. During that time the Commissioner must give any party adversely affected by this Report an opportunity to file objections to the Report and to present argument supporting its position. As noted in the agency's Notice of and Order

¹ See, Minnesota Statutes § 14.62 (Supp. 2005).

² See, Minnesota Statutes § 14.61 (2004).

for Hearing, exceptions or arguments regarding the Report of the Administrative Law Judge should be submitted in writing to Dianne Mandernach, Commissioner, Minnesota Department of Health, Attention: Appeals Coordinator, 85 East Seventh Place, P.O. Box 64970, St. Paul, MN 55164-0970.

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date upon which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.³

Likewise, the Commissioner is obliged to serve her final decision upon each party and the Administrative Law Judge by first-class mail.⁴

STATEMENT OF THE ISSUES

Whether Augustana may lawfully discharge the Petitioner, E.H., for her failure to pay for the nursing care services she has received?

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, E.H., is an elderly woman who has both memory and cognitive impairments that impede her functioning.⁵ Also, based upon an assessment of her “functional, treatment and diagnosis items,” E.H. was assigned a “case mix” classification of PD1.⁶

2. Prior to her admission to Augustana, the Petitioner resided with her son, Robert, at her home in a suburb of Saint Paul, Minnesota.⁷

3. Apart from Social Security benefits, E.H. does not have any independent source of income.⁸

4. The Petitioner's son, Richard, holds a power of attorney that empowers him to handle E.H.'s financial affairs.⁹

³ See, Minnesota Statutes § 14.62 (2a) (Supp. 2005).

⁴ See, Minnesota Statutes § 14.62 (1) (Supp. 2005).

⁵ Testimony of L. Goetz.

⁶ Exhibit G; *compare generally*, Minnesota Statutes § 144.0724 (2004).

⁷ Testimony of R.H.

⁸ Testimony of L. Goetz.

5. On or about March 10, 2005, Linda, Richard's spouse, executed an Admissions Agreement with Augustana for the provision of nursing care services to E.H. The Admission Agreement states that Linda, as the "Responsible Party," agrees:

That [she] has access to the Resident's income, assets and resources and agrees to apply Resident's income, assets and resources to pay for care provide to Resident and other amounts due under this Agreement.

Exhibit H. *Compare also, Minnesota Statutes* § 144A.6501(4)(d) ("Nursing home admission contracts").

6. As of June 1, 2005, in addition to her accrued balances for health care services received from Augustana, but as to which payment was not made, E.H. was incurring new charges at a rate of \$130.70 per day.¹⁰

7. On or about October 1, 2005, the daily rate for services provided to E.H. increased to \$140.06.¹¹

8. On or about March 1, 2006, Augustana sent E.H.'s son, Richard, an invoice for an accrued balance for E.H.'s care totaling \$40,353.22.¹²

9. On or about April 1, 2006, E.H. became eligible for Medical Assistance benefits, retroactive to August 1, 2005.¹³

10. As part of participating in the Medical Assistance program, and the opportunity to receive both retrospective and prospective assistance, E.H. was obliged to make some contributions (known as "spend downs") from her own assets for each month of Medical Assistance coverage. These "spend down" amounts were \$859 for each month of Medical Assistance coverage in 2005 and \$869 for each month of coverage in 2006.¹⁴

11. While E.H.'s family members did make some payments toward the monthly "spend down" amounts after April 1, 2006, the course of payments from E.H.'s family members did not reduce either her pre-eligibility arrearages, or equal the spend down amounts that were due for the period of Medical Assistance eligibility between August 1, 2005 and April 1, 2006.¹⁵

12. A review of the invoices that relate to E.H.'s care, reveals gaps in the sequential order of the checks used by E.H.'s son, Richard, to remit the

⁹ Testimony of L. Goetz; Testimony of R.H.

¹⁰ See, Exhibit A. at 3.

¹¹ See, Exhibit A. at 3.

¹² See, Exhibit A. at 12.

¹³ See, Exhibit A. at 13-14.

¹⁴ *Id*; *compare generally*, Minnesota Statutes § 256B.056 (3d) (Supp. 2005).

¹⁵ See, Exhibit A. at 15-19.

required spend down payments.¹⁶ These checks were drawn on an account that lists both E.H. and Richard as account holders.¹⁷ None of the witnesses testifying at the hearing, however, was able to detail whether the intervening checks in this sequential order were used for any purpose, and, if so, what payments were made with those checks.¹⁸

13. Accompanying the invoices sent to E.H.'s son, Richard, in the months of May and June of 2006, were demand notices for payment of arrearages of \$16,649.20 and \$16,945.20 respectively.¹⁹

14. On or about July 26, 2006, Augustana sent a Notice of Discharge to E.H.'s son, Richard, stating that the facility intended to discharge E.H. to Richard's home, because the cost of the Petitioner's care at Augustana was not being paid. Facility Administrator, Jean Cole, wrote:

[Y]our account is currently in arrears in the amount of \$16,245.20. As a result of your non-payment of this debt, Augustana Health Care Center of Hastings will be forced to discharge your mother on August 25, 2006.

We will discharge your mother to your home Between 9:00 a.m. and noon on August 25, 2006.²⁰

15. The discharge notice to E.H.'s son, Richard, was sent by first class mail.²¹

16. An amended notice, clarifying that the home that Augustana proposed to discharge E.H. to, was owned by her son Richard, and not E.H., was sent by Certified Mail, Return Receipt Requested.

17. On or about August 14, 2006, Richard received the amended notice of discharge.²²

18. There is no evidence in the hearing record that E.H., herself, received a copy of the Notice of Discharge from representatives of Augustana.

19. E.H.'s son, Richard, does not agree to the transfer or willingly assume the responsibility of maintaining E.H.'s care.²³

¹⁶ See, Exhibit B at 1-3, 6-8 and 10-11.

¹⁷ *Id.*

¹⁸ See, Testimony of S. Vesall.

¹⁹ See, Exhibit D and Testimony of S. Vesall.

²⁰ See, Exhibit 1 at 1.

²¹ *Id.*

²² Exhibit F.

²³ See, Testimony of L. Cole; Testimony of L. Goetz.

20. There is no evidence in the hearing record that Augustana has conducted an orientation to ensure the safety and orderly transition of E.H. to a new residence.

21. There is no evidence in the hearing record discharge planning for E.H. has substantially progressed or been completed.²⁴

22. E.H.'s son, Richard, neither testified, nor appeared, at the September 13, 2006 hearing in this matter.²⁵

23. Linda, Richard's spouse, neither testified, nor appeared, at the September 13, 2006 hearing in this matter.

24. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

25. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates by reference that Memorandum into these Findings.

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota and federal law authorize the Administrative Law Judge to: (a) conduct this proceeding; (b) make recommendations to the Commissioner as to whether Augustana's proposed discharge of the Petitioner meets the requirements of the law; and (c) make findings, conclusions, and orders that are related to this appeal.²⁶

2. Augustana is a "facility" within the meaning of 42 C.F.R. § 483.5 and is therefore subject to the requirements imposed by federal law relating to the discharge or transfer of any of its residents.²⁷

3. E.H. is a resident of Augustana within the meaning of 42 C.F.R. § 483.12 and is therefore entitled to the rights created by federal law relating to any transfer or discharge by Augustana.²⁸

4. The Regional Ombudsman, on behalf of E.H., filed a timely appeal of Augustana's notice of discharge.²⁹

²⁴ Compare also, Exhibit 3 and 4.

²⁵ On October 9, 2006, Richard telephoned the undersigned and stated that he did not receive notice of the September 13 hearing, and requested notice of future proceedings.

²⁶ See, 42 U.S.C. §§ 1395i-3 (e) (3) and 1396r (e) (3) (2004); 42 C.F.R. § 483.12 (2005); Minnesota Statutes §§ 14.50 and 144A.135 (Supp. 2005).

²⁷ See generally, 42 C.F.R. § 483.10 (2005).

²⁸ See generally, 42 C.F.R. § 483.12 (2005).

5. Under federal law, one legal basis for discharging a resident from a facility is that “the resident has failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility . . .”³⁰ In order for a facility to rely on that legal basis for discharge, that reason must be specified in the notice of discharge.

6. Under Minnesota law, Augustana must prove facts that are required by law to support its discharge of E.H. by a preponderance of the evidence.³¹

The Failure to Timely Pay for Nursing Care Services:

7. Augustana has the burden of proof in this proceeding to establish by a preponderance of the evidence that E.H. has failed, after reasonable and appropriate notice, to pay for her stay at Augustana.³²

8. The notice of discharge that Augustana issued to E.H.’s son Richard, stated that the Petitioner had “failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility . . .”³³

9. Augustana has provided to E.H.’s son and daughter-in-law, Richard and Linda, reasonable and appropriate notice of all monthly charges for E.H.’s care and of the arrearages that have resulted from the failure to pay those charges.³⁴

10. Augustana has proved by a preponderance of the evidence that E.H., and those responsible for making payments for E.H.’s care, have failed to pay for E.H.’s stay at Augustana’s facility. As a result, E.H. may be subject to discharge from the facility.³⁵

The Requirement of Service of the Notice on the Resident:

11. Before a Medicare-certified long term care provider may involuntarily discharge a resident, the facility must notify the resident, and if known, a family member or legal representative of the resident, of the proposed discharge.³⁶ A nursing facility must issue the required notices at least 30 days

²⁹ See, Notice and Order of Hearing, at 2.

³⁰ See, 42 C.F.R. § 483.12 (a) (2) (v) (2005).

³¹ See, Minn. R. 1400.7300 (5) (2004); *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. App. 1994).

³² Compare, Minnesota Rules, Part 1400.7300 (5) (2004).

³³ See, Exhibit 1.

³⁴ Compare, Exhibits A and D; with Minnesota Statutes § 144.6501 (4) (c) (2005) (Under nursing home admission contracts “[t]he facility must issue timely billing, respond to questions, and monitor timely payment”).

³⁵ See, Exhibits A, B, C and D.

³⁶ See, 42 C.F.R. § 483.12 (a) (4) (i) (2005); *In re Involuntary Discharge or Transfer of J.S. by Hall*, 512 N.W.2d 604, 610 (Minn. App. 1994).

before the resident is scheduled to be discharged.³⁷ Further, the facility must communicate this information in a language and manner that the recipients of the notice understand.³⁸

12. Similarly, Minnesota's "Bill of Rights" for nursing home residents provides in part:

Residents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or programs paying for the resident's care, as documented in the medical record....³⁹

13. There is no evidence in the hearing record suggesting that Augustana has fulfilled the requirement of giving meaningful, personal notice to E.H. of the discharge plan.

The Requirement for Adequate Orientation and Discharge Planning:

14. Under 42 C.F.R. § 483.12(a)(7), "[a] facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

15. There is no evidence in the hearing record to the effect that Augustana has completed (or substantially completed) reasonable discharge planning on E.H.'s behalf.

16. There is no evidence in the hearing record that Augustana has provided the needed orientation so as to ensure E.H.'s safe and orderly discharge from the facility.

³⁷ See, 42 C.F.R. § 483.12 (a) (5) (2005).

³⁸ See, 42 C.F.R. § 483.12 (a) (4) (i) (2005).

³⁹ See, Minnesota Statutes §144.651 (29) (2004).

17. Based upon the current record, there is genuine doubt that E.H.'s medical and personal needs can be adequately met following a discharge to her son's Richard's home.

18. Under the current circumstances, Augustana may not lawfully discharge the Petitioner from its nursing facility.

19. The Memorandum that follows explains the reasons for these Conclusions, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Conclusions.

20. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner:

- (1) **GRANT** the Petitioner's appeal; and,
- (2) **DENY** Augustana's current request to discharge E.H., without prejudice to Augustana's right to re-issue a subsequent and conforming Notice of Discharge following the receipt of the Commissioner's Final Order.

Dated this 9th day of October 2006.

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Tape recorded (three tapes); no transcript prepared.

MEMORANDUM

As the result of amendments to the Omnibus Budget Reconciliation Act of 1987,⁴⁰ a long term care facility that has been certified as a Medicare provider may involuntarily discharge a resident only in specified situations, and then, only after certain statutory and procedural requirements have been satisfied. As a general matter, the law permits discharge of a resident when the resident has failed, after reasonable and appropriate notice, to pay for his or her stay at the facility.⁴¹ The issue in this contested case proceeding is whether Augustana may proceed with discharging the Petitioner following her nonpayment.

Under OAH rules,⁴² the party to a contested case proceeding that proposes a certain action be taken must prove the facts at issue by a preponderance of the evidence – unless some other substantive law provides for a different burden or standard. In this case, Augustana proposes to discharge the Petitioner, E.H., from its facility, and therefore bears the burden of proving by a preponderance of the evidence that it has met the legal requirements for discharge.⁴³

At the September 13 hearing, Augustana presented uncontroverted evidence that, during her stay, E.H. has been accruing monthly charges for her care of between \$130.70 and \$140.06 per day, and that as of June 2, 2006 she had accumulated arrearages of \$16,945.20. Augustana also established that it had promptly and contemporaneously given to E.H.'s son and daughter-in-law, Richard and Linda, monthly statements of account detailing the accumulating arrearages.

These facts begin, but do not conclude, the correct analysis. Under 42 C.F.R. § 483.12 a facility seeking to discharge a resident must also provide meaningful notice *to the resident* of the proposed discharge and to engage in “sufficient preparation and orientation” prior to discharge. As the Ombudsman asserted at the hearing, there is no evidence that Augustana has provided the requisite notice, or undertaken the planning and orientation needed to discharge E.H. Notwithstanding the size, or the duration of E.H.'s unpaid arrearages, which are considerable, Augustana's announcement that the Petitioner will be discharged to the care of her son, by itself, does not meet the requirements of federal law.

So as to give effect to the federal regulations, the best result is to deny Augustana's current request for discharge, but to do so without prejudice to its

⁴⁰ See, 42 U.S.C. § 1396r (c) (2) (2004).

⁴¹ See, *id.*; 42 C.F.R. § 483.12 (2005).

⁴² See, Minn. R. 1400.7300 (5) (2004).

⁴³ See, *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. App. 1994) (the Minnesota Court of Appeals confirms that “a nursing facility proposing to transfer or discharge a resident must prove the supporting facts by a preponderance of the evidence”).

tendering a subsequent Notice of Discharge if E.H.'s arrearages remain unpaid. This Office's prior writings, and the instruction from the Minnesota Department of Health on the discharge process, support this approach. For example, in *The Matter of the Involuntary Discharge of V.M.*, the Administrative Law Judge observed:

[F]ederal law requires that even where a resident is discharged for nonpayment, it must perform appropriate discharge planning. Under 42 C.F.R. 483.12 (a)(7), a facility seeking to discharge a resident must engage in "sufficient preparation and orientation." While the November 15, 2005 Notice of Discharge states that "Roseville Good Samaritan Care Center intends to fulfill its legal obligations in performing appropriate discharge planning" there was no evidence presented at the hearing that Roseville had engaged in any prior planning or orientation as required for discharging a resident. Simply relying upon the statement of the Petitioner's representative, Mr. Jones, that he would "take care of her" does not satisfy the federal requirement.

Roseville has not engaged in the required preparation and so cannot discharge the Petitioner at this time. If Petitioner does not pay the overdue amounts, Roseville can seek discharge again when it has an appropriate discharge plan in place.⁴⁴

Similarly, the Department's instruction to Medicare-certified providers has been to the effect that Notices of Discharge are to be re-issued, and the statutory time periods reset, if federal requirements are not observed during the discharge process. As noted in Information Bulletin 94-1:

On several occasions facilities have had to reissue the notice of discharge because the notice was not in compliance with the provisions of 42 CFR 483.12 (a)(6). They have then had to provide a new 30 day notice period.⁴⁵

Granting the present appeal without prejudice to later discharge notices from Augustana, is the result that best harmonizes the several and competing provisions of state and federal law.

E.L.L.

⁴⁴ *In the Matter of the Involuntary Discharge of V.M.*, OAH Docket No. 54-0900-17184-2 at 6 (2006) (<http://www.state.mn.us/ebranch/oah/aljBase/090017184.report.htm>).

⁴⁵ *Information Bulletin 94-1*, Minnesota Dep't of Health (NH-10 CBC4) ("Correct Notice Procedure") (http://www.health.state.mn.us/divs/fpc/profinfo/ib94_1.htm).